



DUI Updates, Reminders & Tips



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2014

# Legislative Update



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## Penalty Assessment (Victim's Rights Enforcement)

### HB 2625

Prescribes \$2 penalty assessment on:

- Every fine, penalty & forfeiture collected by courts for criminal offenses.
- Any civil traffic penalty
- Fines, penalties or forfeitures for motor vehicle statutes
- Local ordinances for stopping, standing or operation of a vehicle
- Violations of Title 17 game & fish statutes

Effective date from & after 12/31/2014

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## Victim's Right to Privacy

### HB 2454

- Requires victims' identifying & locating information obtained, compiled or reported by law enforcement & prosecutors to be redacted from case records including discovery.
- Defines identifying information & locating information
- Adds identifying info to things victim can refuse to testify to.
- (Makes amendments to escort, child prostitution & other statutes)

Effective date 7/24/2014

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### HB 2454 Responded to Gill

- Prosecutorial offices cannot unilaterally redact victims' birth dates from law enforcement reports disclosed to defense.
- Prosecutor must obtain court order to authorize the redaction.
- Gill controlled until July 23, 2014

*Montgomery v. Hon. Chavez (Gill, Real Party in Interest) 234 Ar. 355 (2014)*

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## 2014 Leaving Accident Scene

HB 2505

- Requires court to order drug screening if it is determined by preponderance accident was caused by drug/ alcohol use
- Makes it a class 6 felony for driver involved in an accident to fail to render aide to the injured.

*\*\*Effective date 7/24/2014*

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## 2014 Watercraft Penalties

HB 2003

Establishes civil penalties for violator's refusal to submit to alcohol/drug test:

- \$750 civil penalty
- Additional \$500 for prison fund
- Additional assessment of \$500 if convicted of OUI

Assessments now to law enforcement & boating safety fund rather than equipment fund

*\*\*Effective date 7/24/2014*

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## 2014 Watercraft Penalties

HB 2003

Aggravated OUI:

- person under 15 aboard the watercraft (Removes the proof of a first OUI offense, reckless endangerment of the child with substantial risk of physical injury and 2<sup>nd</sup> offense within 84 month requirements to qualify as Agg.)

*\*\*Effective date 7/24/2014*

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## 2014 Watercraft Penalties

### HB 2003

**Leaving the Scene:**

- Failure to stop after collision resulting in only damage to property of another is Class 3 misdemeanor regardless of whether the watercraft is operated or attended by another person.

*--Effective date 7/24/2014*

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## 2014 Tampering With a Witness/Interview With a Minor

### HB 2312

**Amends victim's rights:**

- Minor who has agreed to interview may not be interviewed by defendant/defense attorney/agent unless prosecutor is notified at least 5 days in advance even if minor's parent/legal guardian initiated contact.

*--Effective date 7/24/2014*

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## 2014 Tampering With a Witness/Interview With a Minor

### HB 2312

- Specifies tampering with witness includes communicating directly or indirectly with witness
- Expands offense to include act of communicating directly or indirectly with a person to evade a summons or subpoena.

*--Effective date 7/24/2014*

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2014

Criminal Damage - Economic Loss

HB 2571

• Damages for graffiti & aggravated criminal damage include:

- Reasonable labor costs, reasonable material costs & any reasonable costs attributed to equipment used to abate or repair the damage.

Effective date 7/24/2014

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2014

Misconduct Involving Weapons - Judicial Officers

SB 1266

- Allows judicial officers to carry firearms in courthouses if they demonstrate competency with a firearm & comply with presiding judge's policies
- Does not apply to hearing officers an part-time judicial officers.

Effective date 7/24/2014

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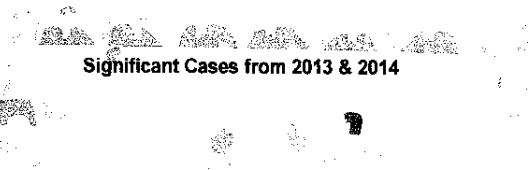
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Case Law Updates  
Reminders & Suggestions



Significant Cases from 2013 & 2014

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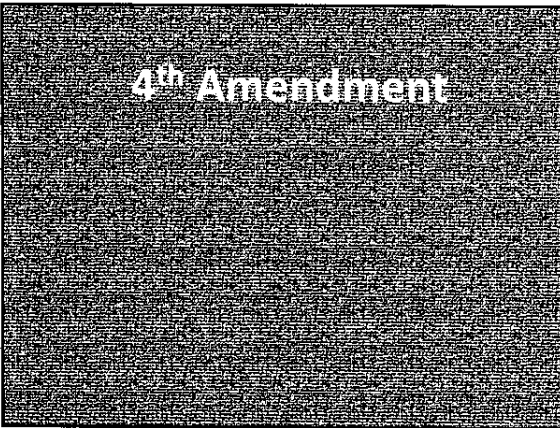
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### Bicycles

- ARS 28-817(A) requiring bikes to have lamp (500 ft. visible light) on front, applies to bikes being operated on sidewalk as well as roadway.

*State v. Baggett*, 232 Ariz. 424 (App. 2013).




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### Pat Down Search

- Officers had reasonable suspicion to perform weapons pat-down which included removing backpack & placing on patrol car
  - Had grounds to stop
  - 2:30 a.m. in area known for high crime
  - Defendant appeared nervous
  - Defendant was evasive answering questions about how he acquired the backpack
  - Backpack could hold a weapon

*State v. Baggett, supra.*

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### Plain Smell

- Officers had probable cause to search backpack
  - Had grounds to stop
  - Smelled marijuana coming from backpack immediately after placing backpack on hood of patrol car.

*State v. Baggett, supra.*




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### Plain Smell Doctrine

- Officers must lawfully be in position to view/smell the object
- Its incriminating nature must be immediately apparent
- Officer must have lawful right of access to the object
- (did not address effect of medical marijuana act)

*State v. Baggett, supra.*

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### Anonymous Tips

- *Navarette v. California*, 134 S.Ct. 1683 (2014).
- Officers who received "anonymous" 911 tip about drunken/reckless driver, had grounds to stop even though did not corroborate any dangerous driving before stopping vehicle.
- Totality of the circumstances standard

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### **Anonymous Tips**

- Reminders:
  - Must Be Reliable
    - Is it traceable? [911 calls.] Do we have name/# ?
    - How much time has elapsed:
      - between incident & call
      - between call & officer observation of vehicle
    - Proximity to reported location
    - Did caller claim eye witness status?

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### **Anonymous Tips**

- Reminders:
  - Must Be Reliable
    - How well did vehicle match description?
    - More than one caller?
  - Tip must provide grounds for stop
  - Officer's additional observations
  - How long did officer follow suspect?

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### **Stop of Vehicle – Good Faith**

- Officer who stopped car for no license plate but did not see temporary registration until after the stop, acted in good faith
- Officer could contact driver to tell him he was free to leave
- Beer cans & symptoms of impairment observed at that point permitted officer to proceed with a DUI investigation

*State v. Nevarez, 687 Ariz. Adv. Rep. 6 (App. 2014).*

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### Stop of Vehicle Reminders

#### ▣ Community Caretaking

- *Becerra*
- *State v. Organ*, 225 Ariz. 43 (App. 2010).
- *State v. Mendoza-Ruiz*, 225 Ariz. 473 (App. 2010).

#### ▣ Provide ALL Reasons/Support for Stops

- *Whitman*
- Avoid *Livingston* situations
  - Title 28 AND
  - Impairment

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### 4<sup>th</sup> Amendment Reminders

- Good Faith
- Exclusionary Rule (suppression) is NOT automatic
  - *Herring v. US*, 555 U.S. 35 (2009).
  - If relying on overturned precedent – *Davis v. US*, 564 U.S. \_\_\_\_ (2011)
- Inevitable discovery. *State v. Rogers*, 216 Ariz. 555 (App. 2007)
- Look for no stop – *Robles*
- AZ no tougher than feds except for home searches

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### Reminder

Ask – Does 4<sup>th</sup> Amendment Apply?

- 1) Did defendant have an expectation of privacy?
- 2) Was there a search or seizure?
- 3) Was there State action?



If so – was it reasonable, is there a warrant exception?

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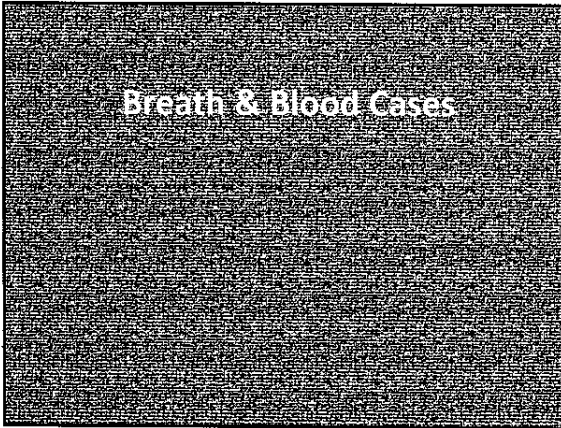
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### **Right to Independent Blood Test**

- Defendant waived right to independent blood test when stated he would "take care of it later."
- Officer did not interfere with right by failing to tell defendant he would be booked into jail.

*State v. Nevarez*, 687 Ariz. Adv. Rep. 6 (App. 2014).

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### **Breath Testing**

- Partition Ratio Evidence (PRE) is NOT relevant to (A)(2) charge
- PRE is relevant to (A)(1) impairment charge
- PRE is admissible without evidence of defendant's individual physiology
- Either party may invoke the DUI presumptions
- Subject to 403 weigh
- Should be subject to Rule 702 analysis

*State v. Cooperman*, 232 Ariz. 347 (2013).

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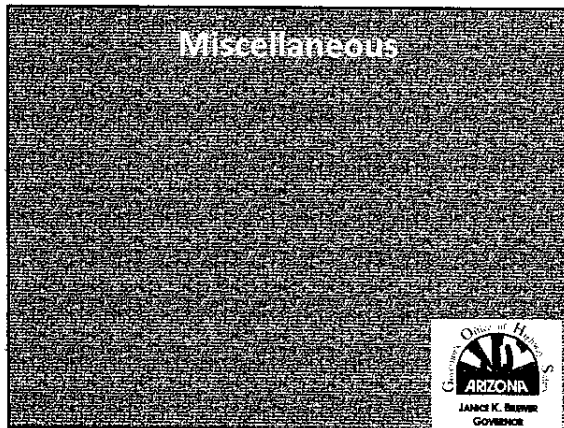
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### **Corpus Delicti**

- Circumstantial & independent evidence corroborated defendant's admissions to drinking & driving
  - Defendant was found in home which was near crash scene
  - Visibly intoxicated
  - Nature of crash suggested impaired driving
  - Girlfriend indicated defendant sometimes drives the truck
  - Removed defendant's property from the truck

*State v. Gill, 234 Ariz. 186 (App. 2014).*

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### **Evidence for Corpus Delicti**

- Witness statements (hearsay)
- Who takes responsibility for vehicle?
- Who has keys?
- Location in or proximity to vehicle
- How close was crash to defendant's home/work?
- How recent was the crash?
- Nature of crash consistent with impaired driving?
- Injuries
- Are all potential drivers impaired?
- Remember to address all DUI elements

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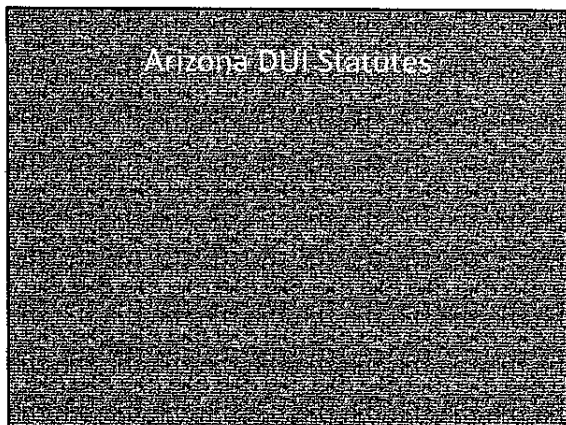
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**Ambien/Sleep Driving**

- Defendant who drove while impaired by Ambien, Celexa & Benadryl lacked standing to challenge constitutionality of (A)(1)
- (A)(1) is not vague as applied
- (A)(1) is a strict liability offense
- State need only show offender took a drug that caused impairment, not that he knew it would cause impairment

*State v. George*, 233 Ariz. 400 (App. 2013).

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**Carboxy THC**

- To Prosecute Under A.R.S. § 28-1381(A)(3) the Metabolite Must be Capable of Impairment
  - No Carboxy THC cases under this statute
  - Encourage Officers to get blood ASAP
  - Some labs test for Hydroxy some do not
  - Some labs either have or are switching cutoff levels to a 1

*State v. Harris (Shilgevorkyan, RPI)*, 234 Ariz. 343 (2013).



OFFICE OF THE ATTORNEY GENERAL  
STATE OF ARIZONA  
JANICE K. BREWER  
GOVERNOR

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### Carboxy THC

- Will Have to Prove Metabolite is Capable of Impairment for (A)(3)
  - Actual impairment still not required for (A)(3) charge
  - Recommend have witness testify to impairment capability during trial
    - Even if judge ruled pre-trial

*State v. Harris (Shilgevorkyan, RPI), 234 Ariz. 343 (2014).*

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### Medical Marijuana

#### Reminder

- Medical Marijuana is NOT a Defense to DUI in Arizona
- See Beth for Medical Marijuana Handout

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### Marijuana




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## Marijuana Edibles

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## Dabs/Conc.

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## Not Your (Grand)Parents' Marijuana

- Average THC:

- 1983: <4%
- 2007: 7.3%
- 2008: 10.1%

- Dabs – 80 – 90%
- 2014 – up to 34%




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## Challenges

- Claim - Marijuana does not impair driving

### Marijuana Smoking Associated With Minimal Changes In Driving Performance, Study Finds

FRIDAY, 28 MAY 2010 13:00 PRESS RELEASE AUTOMOTIVE

Hartford, CT—(ENEWSPP)—May 28, 2010 Subjects exhibit virtually identical psychomotor skills on a battery of driving simulator tests prior to and shortly after smoking marijuana, according to clinical trial data published in the March issue of the *Journal of Psychoactive Drugs*.

## Whose Marijuana?

Subjects performed the tests sober and then again 30 minutes after smoking a single marijuana cigarette containing either 2.9 percent THC or zero THC (placebo).

- Remember Average THC:

- 1983: <4%
- 2007: 7.3%
- 2008: 10.1%
- 2014: up to 33%    Dabs: 80 – 90%

## Learn & Use The Studies (Example)

- The Effect of Cannabis Compared with Alcohol On Driving; Sewell, et. al Am J. Addict, 2009

- Significant impairment at low levels when alcohol & Cannabis are combined

### Measurement of Uncertainty (Uncertainty Budget)

- Will see on crime lab record
  - One reading averaged
  - Range reported
- ASCLAD/ISO is requiring
- Defense is already challenging
  - Pre-trial
  - During trial

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### Measurement of Uncertainty

- Defense experts challenging the way it is being calculated
- Data points not included

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### Measurement of Uncertainty

- Def. claiming can have NO confidence in method if this calculation is not perfect
- A test result is only complete when presented with it's total uncertainty
- Defense is requesting MASSIVE amounts of discovery

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## Measurement of Uncertainty

- Defense challenging admissibility of evidence
  - Rule 702
  - Rules 401 & 402
  - Rule 403
  - Confrontation
    - must have all criminalists who worked on uncertainty calculation
    - must have all info

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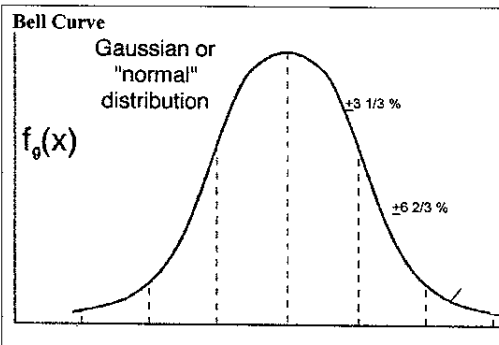
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## Discovery

- Clearly a fishing expedition
  - *State v. Bernstein* (Herman, RPI), No. 1 CA-SA 12-0226 (unpublished).
  - *State v. Fields* (Rosengren, RPI), 196 Ariz. 580 (App. 1990).
- Crime lab affidavits
- Information regarding other tests is not relevant
- Each test/batch stands alone

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### Confrontation

- MU Evidence is not testimonial
  - Not created for any specific case
  - Equate with calibrations, MVD records, etc.
- Confront the expert – not uncertainty budget

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### Admissibility

- None of this should be foundational!!!
- AT MOST goes to weight, not admissibility
- Case law overwhelmingly recognizes reliability & admissibility of our methods
- New *Bernstein* Opinion (317 P.3d 630)
- Not relevant - 403

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### Uncertainty Budget

- Work with your lab!!!

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**Hot Topics**

- Blood Draws/Breath Tests
  - *McNabb*
  - *Tyler B. (under NPI)*
- Prescription Drug DUI

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GOVERNOR'S OFFICE on Highway Safety  
**ARIZONA**  
JANICE K. BREWER  
GOVERNOR

**Beth Barnes**  
**AZ GOHS Traffic Safety**  
**Resource Prosecutor**  
**[beth.barnes@phoenix.gov](mailto:beth.barnes@phoenix.gov)**

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# Be Offensive!!

Using Motions *in Limine* to Improve Your DUI Case

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## Why File Motions *in Limine*?

- Strengthen Case
- Avoids Motions for Mistrial
- Allows Potential Appellate Action
- Helps With Trial Notebook

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## What is a Motion *in Limine*?

"A written motion which is usually made before or after the beginning of a jury trial for a protective order against prejudicial questions & statements"

"Purpose of such motion is to avoid injection into trial of matters which are irrelevant, inadmissible and prejudicial ..."

*Black's Law Dictionary*

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## AZ Case Law

- In criminal cases, "[a] pretrial motion *in limine* is merely a convenient substitute for evidentiary objections at trial."
- State may object to Defendant's proposed evidence at trial - not required to submit a written motion in advance of trial.

*State v. Alvarez*, 228 Ariz. 579 (App. 2012).

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## Preserves Issues for Appeal

"[W]here a motion *in limine* is made and ruled upon, the objection raised in that motion is preserved for appeal, despite the absence of a specific objection at trial"

*State v. Leyvas*, 221 Ariz. 181 (App. 2009).

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## Rule 103 - Rulings on Evidence

Subsection (b) - once the court definitively rules on the record, no need to renew objection or offer of proof to preserve the claimed error.

- Be sure the court has definitively ruled

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## Defense Motions to Suppress in the Guise of Motions *in Limine*

OBJECT! Move to strike

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## Types of Motions *in Limine*

- Objections to defense evidence
- Requests to admit our evidence

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## Objecting to Defense Evidence

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## Rule 702

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### **Rule 702. Testimony by Expert Witnesses**

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- b) the testimony is based on sufficient facts or data;
- c) the testimony is the product of reliable principles and methods; and
- d) the expert has reliably applied the principles and methods to the facts of the case.

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## Rule 702

- Microclots
- Statistical Stacking
- Partition Ratio
- Exclude expert's outside their area of expertise
- Test results w/no expert
- Hanging drop

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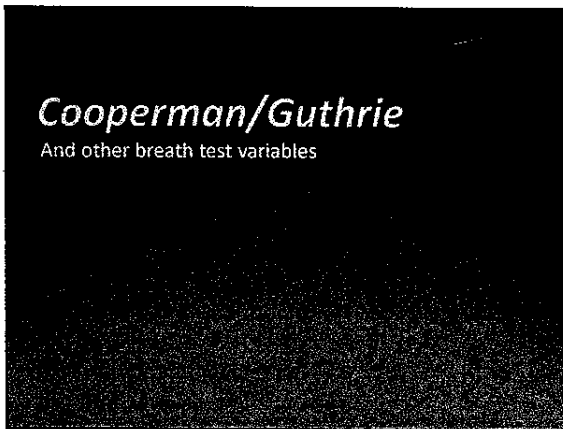
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**Breath Testing Variables**

- Partition Ratio Evidence (PRE) is NOT relevant to (A)(2) charge
- PRE is relevant to (A)(1) impairment charge
- PRE is admissible without evidence of defendant's individual physiology
- Either party may invoke the DUI presumptions
- Subject to 403 weigh
- Should be subject to Rule 702 analysis

*State v. Cooperman, 232 Ariz. 347 (2013).*

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**The Easy One**

- Partition Ratio Evidence is Inadmissible for the *Per se* Charges
  - Prevent arguments
  - Settle jury instructions
    - The jury may not consider the 2100 – 1 partition ratio evidence for the per se charges

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### Cooperman – What Does it Mean For the (A)(1)?

- Still subject to 403 weigh & Rule 702 analysis
  - Partition ratio
  - Breathing patterns
  - Breath temperature
  - RFI
  - Etc.

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### Partition Ratio – if admitted

- Remember benefits defendant
- Submit limiting jury instruction & make certain it is clear to jury does not apply to *per se* charges

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### Ambien & Intent

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## DUI is Strict Liability

- DUI/APC is a *malum prohibitum* crime.
- It does not require proof of a culpable mental state.
  - Ignorance of drug effects NOT a defense
  - Passive inhalation NOT a defense
  - Involuntary intoxication NOT a defense
  - Intent to drive NOT required (APC)
  - Sleep driving NOT a defense

*State v. Parker*, 136 Ariz. 474 (App. 1983); *State v. Williams*, 144 Ariz. 487 (1985); *State v. Superior Court (Cunningham, RIA)*, 184 Ariz. 409 (App. 1995); *State v. Zaragoza*, 221 Ariz. 49(2009); *State v. George*, 233 Ariz. 400 (App. 2013).

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## Medical Marijuana

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## Medical Marijuana

- Preclude "medical marijuana" defense and all evidence (including registry cards)
  - It is not a defense to the (A)(1) charge
  - Prescription defense does not apply to the (A)(3)
  - It is NOT relevant

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## Medical Marijuana

- Has caused issues with jury appeal
  - Need to prepare voir dire
  - Need to submit jury instructions
  - Need to educate your jury

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## Prescriptions

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## Prescription Drug Defense

### ARS 28-1381(D)

*State v. Bayardi (Fannin, RPI), 230 Ariz.195 (App. 2013)*

Defendant must prove took prescription as prescribed

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## Prescriptions

- Preclude Any Mention of a Prescription if not a defense
- Preclude Admission Without Evidence of Appropriate Doctor, date of prescription, etc.
- Settle Jury Instructions

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## Precluding Self-Serving Hearsay

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*State v. Barger*,  
167 Ariz. 563 (App. 1990)

- Defendant's attempts to admit his statements though the arresting officer properly precluded as self-serving hearsay.

Also, *State v. Wooten*. 193 Ariz. 357 (App. 1998).

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## Others

Necessity  
Facts used just for sympathy  
Officer under investigation  
Irrelevant COBRA/blood test evid. from other cases  
Judicial notice of "10% margin of error"  
Issues from other places (Scottsdale lab)

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## Admitting Our Evidence

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## PBTs

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### Admit PBT for Presence of ETOH

- Merely use for presence of alcohol
- Use case law – *Valenzuela v. Cowen*, 179 Ariz. 286 (App. 1994)(PBT acceptable for PC).
- Only reason PBT results are not admitted is do not meet requirements of 28-1323(A)

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### Admit PBT for Presence of ETOH

- Neither statute nor case law suggest foundation needed for mere presence of alcohol
- Statutory foundation ensures accuracy of the result – for presence we don't care
- It's relevant
- Need witness who will testify PBT is capable of detecting the presence of alcohol

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### Admit PBT Refusal

- No Constitutional right to refuse.
- Refusal is not testimonial evidence. So no 5th Amendment issue. *State v. Superior Court (Ahrens)*, RPD, 154 Ariz. 574 (1987).
- A DUI suspect has power, but not right, to refuse. *State ex rel. Verburg v. Jones*, (Phillips RPD), 20 Ariz. 413, 539 (App. 2009)

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### Admit PBT Refusal

- It does not matter that the test would not have been admissible
- It is relevant to demonstrate consciousness of guilt
- Can admit & comment – just like FSTs

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### Prevent Defense From Admitting the Actual Number

- Cannot meet requirements of ARS 28-1323(A)
  - Observation period & second sample or 15 min. deprivation with duplicate tests
  - Calibrations
  - Specific instrument may not be DPS approved
- Cannot meet the requirements of Rule 702
  - Not scientifically reliable without the above

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### Defense Must Meet the Same Standards of Foundation

- Independent samples
- Second samples
- And PBTs

*State ex rel. McDougall v. Johnson (Foster, RPI), 181 Ariz. 404 (App. 1994); Deason.*

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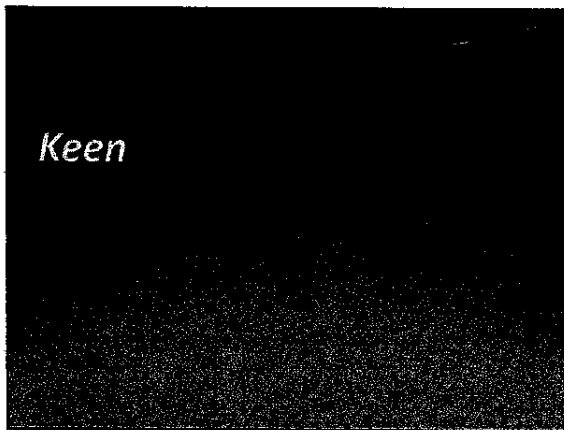
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**Second Sample - KEEN**

**If defendant :**

- 1) requests & obtains a sample for his/her own use &/or
- 2) attacks validity of State's test

**State may:**

- \* cross-examination about receiving second sample, &
- \* comment on defendant's failure to produce evidence of second sample results at trial (reasonable inference against them).

*State ex rel. McDougall v. Corcoran (Keen, RPI), 153 Ariz. 157 (1987).*

If they test and notice an expert file motion for disclosure.

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**Remember – Proceed with Caution!**

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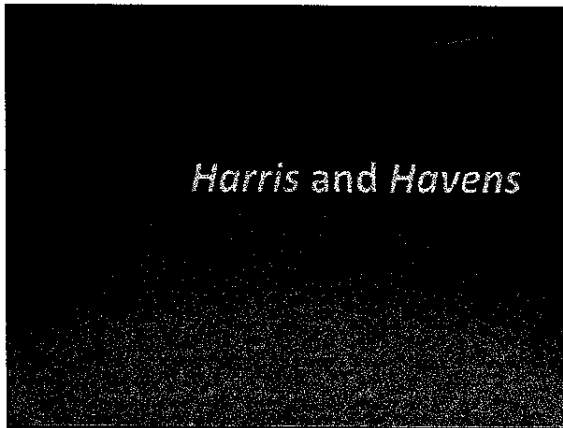
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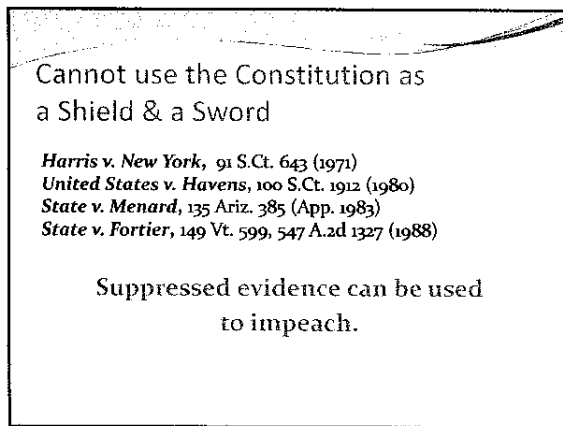
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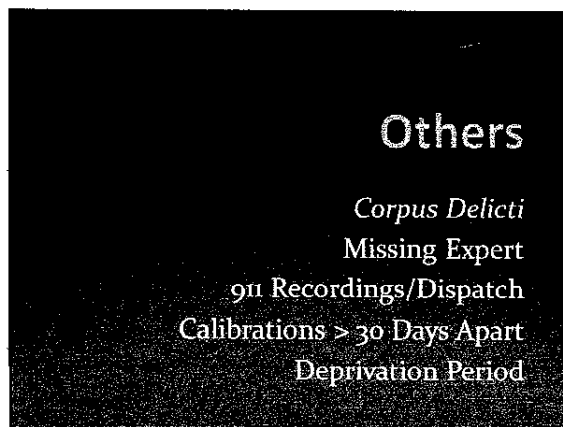
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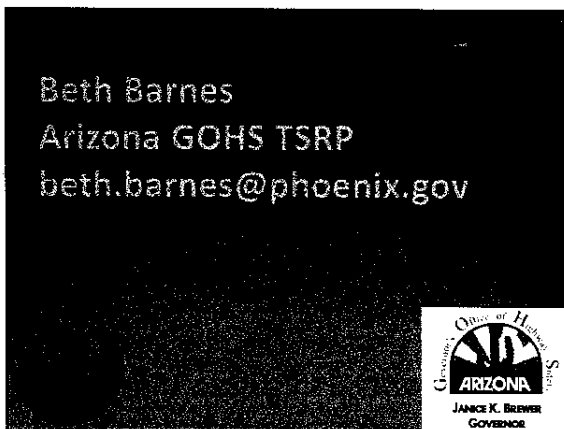
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